In The

Supreme Court of the United States

October Term, 1976

No. 76-1376

RAYMOND ROHAUER and CECIL W. HULL,
Petitioners,

vs.

KILLIAM SHOWS, INC. and EDUCATIONAL BROADCASTING CORPORATION,
Respondents.

REPLY BRIEF FOR PETITIONERS IN SUPPORT OF APPLICATION FOR WRIT OF CERTIORARI

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Respondents grudgingly concede that the decision of the Court of Appeals here sought to be reviewed "is not without significance",[1] and represents an attempt to resolve "a previously unanswered issue of copyright law" (Br. p. 2). They contend, however, that certiorari should be denied in this case because the newly adopted Copyright Act of 1976 (90 Stat. 2541) "dispenses

1 Indeed, the February, 1977 issue of the Bulletin of the Copyright Society of the USA departs from its customary summarization of important copyright decisions to reproduce the opinion of the Court of Appeals in its entirety "because of the *unusual significance* of this decision" (Vol. 24 No. 3 at p. 169). To the writer's personal knowledge, a goodly number of Law Review comments on the instant case are in the course of preparation or publication.

with the system of initial and renewal terms" of copyright, so that *only* "works created prior to January 1, 1978 will be affected by the decision" (Br. p. 3). That contention, it is submitted, is a vast oversimplification of the actual fact.

Section 203 of the new Act which takes effect on January 1, 1978 and which admittedly deals with the precise question here at issue, will not, by its terms, become operative during the current century.[2] In the interim, the literally millions of copyrights now in their initial term[3] will be governed as to their renewal and the legal consequences thereof by new Section 304(a) which, except for the duration of the renewal term, is in all respects a *verbatim* copy of the present Section 24. Thus, as a Copyright Committee of the American Bar Association has pointed out (Petition p. 12 fn. 5), the decision in this case "will have a major impact on authors despite the passage of the new Copyright Act." There is, accordingly, no real substance to a claim that review by this Court of the decision of the Court of Appeals would be inappropriate because the disputed issue has been laid to rest by newly adopted legislation. On the contrary, that issue is, and will continue to be, a very live one for several decades to come.

Respondents also maintain (Br. p. 8 *et seq.*) that certiorari should be denied in this case because the decision of the Court of Appeals in no way conflicts with any prior decision of this Court. Here again, respondents are guilty of oversimplification. It may be possible to distinguish *Miller Music, Inc. v. Charles N. Daniels, Inc.*, 362 U.S. 373 (1960) on its precise facts, as was done by the Court of Appeals (Appendix 14a), but its basic concept and philosophy may not be disposed of so readily.

2. The earliest possible date on which a termination under the provision of Section 203(b)(1) of the new Act can take place is January 1, 2013.

3. The Senate Committee on the Judiciary has estimated that when the new Act takes effect there will be some 6,000,000 subsisting copyrights still in their original term (S. Rept. 473, 94th Cong. 1st Sess. at p. 122).

Once the major premise of *Miller Music, supra,* that rights under a renewal copyright must be treated "as expectancies until the renewal period arrives" (362 U.S. at 377) is accepted, no dispositive language in the contract between an author and his licensee can transform that contingent estate into a property right sufficient to defeat the interest vested in a statutory successor to the renewal copyright. Yet, that is precisely what the decision of the Court of Appeals has attempted to accomplish by its holding that a "consent" for the creation of a derivative work once given by an author who contractually undertakes to convey like rights under the renewal when it accrues,[4] continues to be operative and to be binding upon his statutory successor during the renewal term, notwithstanding the author's death prior to the date on which the right to renew accrues. It is upon this rock that the distinction made by the Court of Appeals must founder, and respondents' assertion that certiorari should be denied because that decision in no way conflicts with prior rulings of this Court must likewise sink.

It is, of course, insufficient to justify petitioners' application that respondents have been unable to demonstrate any valid reason why certiorari should not be granted. The burden remains, as it should, on petitioners to show why review by this Court would be appropriate and should be had. Petitioners rest their case on the enormous importance of the legal question that is here squarely presented, apparently for the first time.

For at least 40 years it had been widely assumed that the applicable law was as stated in the District Court's opinion in this case, and a large number of transactions have been negotiated and concluded in reliance on the proposition that a

4. It is to be noted that in the motion picture industry grants of this character are routinely exacted from authors and that only in the exceptional case is the author's bargaining power sufficiently strong for him to resist successfully. Melnicker "Termination of Transfers and Licenses under the New Copyright Law" 12 N.Y. Law School Law Review 589 at 613, 615 (1977). Mr. Melnicker was formerly general counsel to Metro-Goldwyn-Mayer, Inc.

statutory successor takes the renewal "free and clear of any rights, interests or licenses attached to the copyright for the initial term." *Fitch v. Schubert*, 20 F. Supp. 314, 315 (S.D.N.Y. 1937).[5] The contrary holding by the Court of Appeals has come as a stunning shock not only to the copyright bar, but more importantly to authors and their families generally. This is the very type of case that ought to be reviewed by this Court of last resort and therefore the petition for a writ of certiorari to the Court of Appeals for the Second Circuit should be granted.

Respectfully submitted,

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5. See also: *Melnicker, supra*, fn.4 at page 612 fn. 117. 616 where the author states that up to now this has been "the prevailing view" in both literary and motion picture circles. Of particular interest is his reference to the situation with respect to the "blockbusting" motion picture "Gone with the Wind".